



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO.427 OF 2018**

**IN THE MATTER OF ARTICLES 2(1), (4), (5) & 6, 3(1), 19, 20, 22(2) (d), 24, 47, 48, 50(1), 165(3) (b) and (d), 258 and 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 27(1), 31(c) & 118(2) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF SECTION 63 OF THE FINANCE ACT, ACT NO.10 OF 2018**

**AND**

**KENYA BANKERS ASSOCIATION.....PETITIONER**

**VERSUS**

**THE HONOURABLE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL ASSEMBLY.....2<sup>ND</sup> RESPONDENT**

**AND**

**CENTRAL BANK OF KENYA.....INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The Petitioner herein is seeking an interpretation whether Section 63 of the Finance Act, 2018 and Section 31(c) of the Banking Act are in conflict with Article 31(c) of the Constitution. The Petitioner is also seeking an interpretation on whether in introducing amendments during the 2<sup>nd</sup> and 3<sup>rd</sup> Reading of the Finance Bill, 2018, the 2<sup>nd</sup> Respondent failed to adhere to the national principle of public participation.

**Petitioner's Case**

2. A brief background of the case is that on 19<sup>th</sup> June, 2018, the Finance Bill, 2018 was published in the Kenya Gazette Supplement No. 76 (*National Assembly Bills No. 20*). The Memorandum of objects and reasons of the Bill was to formulate the proposals announced in the budget for 2018/2019 relating to liability, and collection of taxes and matters incidental thereto and sought to amend various laws including the Banking Act.

3. This Bill was first read in the National Assembly on 3<sup>rd</sup> July, 2018 and committed to the Departmental Committee on Finance and National Planning (*"the Committee"*) which carried out public participation on the Bill during which time the Petitioner made both oral and written submission to the Committee. However, Section 63 of the Finance Act was not included in the Bill at the time of gazettelement and first reading of the Finance Bill, 2018. Thereafter, the Bill underwent debate during the second reading on 23<sup>rd</sup> and 28<sup>th</sup> August, 2018 and new clauses introduced to the Bill at this stage by the National Assembly.

4. One of the proposed amendments was to require the banks, whenever a customer is opening an account, should be compelled to indicate who their next of kin is. Reason being, very many people were losing their money when they die and that the banks do not look for the next of kin and that the banks remain with the money for exceedingly long periods. The National Assembly thereafter debated and voted for each of the clauses during Committee of the Whole Stage on 29<sup>th</sup> and 30<sup>th</sup> August, 2018 and introduced the new clauses among them being clause 57 and contrary to the objects of the Bill.

5. The Bill was passed on 30<sup>th</sup> August, 2018 and forwarded to the President who declined to assent to it and referred it back to the 2<sup>nd</sup> Respondent making several recommendations on his refusal to assent. The 2<sup>nd</sup> Respondent in a special sitting on 20<sup>th</sup> September, 2018 considered the President's reservations and approved the same without amendments. The President assented to it on 21<sup>st</sup> September, 2018 and is now the Finance Act, 2018.

6. It is the Petitioner's contention that the 2<sup>nd</sup> Respondent acted *ultra vires* its constitutional mandate by introducing substantive amendments to the Banking Act on the floor of the House during the 3<sup>rd</sup> Reading and enacting legislation without public participation. The Petitioners therefore seek the following orders:-

a) The Honourable Court be pleased to interpret the Constitution and determine whether Section 63 of the Finance Act, 2018 and Section 31(c) of the Banking Act are in conflict with Article 31(c) of the Constitution.

b) The Honourable Court be pleased to issue an interpretation and make determination on whether, the 2<sup>nd</sup> Respondent by introducing amendments during the 2<sup>nd</sup> and 3<sup>rd</sup> Reading of the Finance Bill, 2018 breached the national values and principles enshrined under Article 10 of the Constitution for failing to subject the amendments to public participation.

c) A declaration that Section 63 of the Finance Act, 2018 (Act No. 10 of 2018) and consequently Section 31(c) of the Banking Act is null and of no legal effect for being unconstitutional.

d) A declaration that section 63 of the Finance Act, 2018 and consequently Section 31(c) of the Banking Act is invalid for being vague and ambiguous.

e) The Costs of and relating to this petition.

f) Such other or further orders as this Honourable Court may deem just and expedient in the circumstances in protection of the constitution and protection against violation of fundamental rights.

### **2<sup>nd</sup> Respondent's Response**

7. On its part, the 2<sup>nd</sup> Respondent filed a Replying Affidavit by **Michael Sialai EBS**, the Clerk of the National Assembly sworn on 26<sup>th</sup> April, 2019. He deposed that the National Assembly's mandate to enact, make and repeal laws is derived from the Constitution and the present petition threatens the legislative role of parliament and specifically the National Assembly derived from Articles 1(1), 94 and 95 of the Constitution. That pursuant to Article 118 of the Constitution as read with Standing Order 127 of the National Assembly Standing Orders, the Departmental Committee on Finance and Planning conducted extensive public participation on the Finance Bill and the Petitioner made both oral and written submissions to the committee.

8. He deposed, that the Committee prepared a report dated August, 2018 and the same was tabled before the House and underwent debate on 23<sup>rd</sup>, 28<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup> August, 2018 where amendments to the Bill were proposed, one of the clauses being Clause 57A which was moved by the Chair of the National Assembly Departmental Committee on Finance and Planning during the Committee of the whole house. That the amendment was initially proposed by Hon. Jude Njomo who is a Member of Parliament for Kiambu Constituency during the second reading but was overruled for failing to comply with Standing Order 131. Thereafter he appeared before the Departmental Committee on Finance and Planning and the said amendment was subsequently moved by the Chair of the Committee in compliance with Standing Order 133(2)

9. The National Assembly considered and passed Section 63 of the Finance Act on 29<sup>th</sup> August, 2018 and the Bill subsequently forwarded to the President for his assent in accordance with Article 115 of the Constitution but he declined and referred it back to the National Assembly on 13<sup>th</sup> September, 2018. However, on 21<sup>st</sup> September, 2018, the President in exercise of powers conferred to him under Article 115(1) (b) of the Constitution assented to the revised Finance Bill and Section 63 of the Finance Act entered into force. It was further his disposition that where a law is enacted by Parliament, it is presumed to be constitutional and the test for establishing constitutionality of a statute is for the court to first determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the statute itself and the Petitioner had failed to satisfy that test.

10. It was his disposition that the amendment was informed by Unclaimed Financial Assets Authority who claimed that in November 2017 unclaimed assets hit Kshs. 25 Billion as a result of holding institutions including banks failing to locate owners of the assets. Therefore, the objective of the impugned amendment is for banks to maintain the details of the next of kin so that where a customer dies, his next of kin is aware of the existence of the said bank account thereby protecting the deceased's rights to property under Article 40 of the Constitution.

11. Further Article 94 of the Constitution vests legislative authority in Parliament and therefore the National Assembly is allowed to amend a legislative proposal as the bill goes through the various stages of enactment to allow members of the House who represent different constituencies of the electorate to negotiate on their behalf and represent their varying interests. The import of Article 124 of the Constitution and Standing Order No. 133 recognize that a House of Parliament can amend bills at the Committee of the Whole House and Standing Order 133(11) provide for procedures to be followed by the house once such amendments have been proposed. It was his argument that to hold that a House of Parliament must pass a legislative proposal in its initial form is to take away the power that Article 94 of the Constitution grants

to both Houses of Parliament. He also insinuated that the National Assembly conducted public participation through its members who are representatives of different constituencies.

12. He further deposed that Section 19 of the Unclaimed Financial Assets Act No. 40 of 2011 requires a holder of assets to which the Act applies to make reasonable efforts to locate the owner and notify the owner about those assets and the purpose and effect of the impugned section is to ensure that the abandoned property is returned to its true owner and within reasonable time. Further, a next of kin is not necessarily a beneficiary under the Law of Succession and informing a next of kin of the existence of a bank account after it has been abandoned does not amount to disclosure under Section 32(2) of the Act but in compliance with Section 19 of the Unclaimed Financial Assets Act No. 40 of 2011 and international best practices on transparency and accountability. In any event, the impugned law is not a new innovation meant to curtail the right to privacy but is rather supported by existing banking practice.

13. In conclusion, he deposed that the orders sought by the Petitioner are tantamount to asking the court to amend or repeal a piece of legislation and is an encroachment to the legislative mandate of Parliament. He therefore urged court to dismiss the Petition.

14. The Attorney General and the Interested Party did not file any replies to the Petition.

#### **Petitioner's Submissions**

15. Ms. Leila Ahmed appearing for the Petitioner highlighted her written submissions dated 8<sup>th</sup> April, 2019. On jurisdiction, she submitted that the petition is premised on the jurisdiction of the High court to interpret the Constitution, the dispute being a question whether the impugned amendments is inconsistent with or in contravention of the constitution which falls within the purview of Article 165(3)(d) of the Constitution. To buttress this argument, counsel relied on the case of **Simeon Kioko Kitheka & 18 Others –vs- County Government of Machakos & 2 Others (2018) eKLR**.

16. On the constitutionality of the statute, counsel emphasized on the general principle that there is a rebuttable presumption that legislation is constitutional hence the onus of rebutting the presumption rests on those who challenge the legislation's status. She relied on the case of **Macharia –vs- Murathe & Anor Nairobi HCEP No. 21 of 1998 (2008) 2KLR (EP) 189 (HCK)** and the case of **Katiba Institute & 3 Others –vs- Attorney General & 2 Others (2018) eKLR** for this argument.

17. On whether Section 63 is an infringement to the right of privacy under Article 31 of the constitution as well as in contradiction to Section 31(2) and (3) of the Banking Act, counsel submitted that its members are bound by the common law principles of confidentiality as well as the requirements under the Banking Act relating to non-disclosure of information. Therefore, the requirement under Section 63 of the Finance Act for banks to maintain a register of next of kin is not justifiable and does not have a rational connection with the intended purpose of the Finance Act, 2018.

18. On ambiguity and vagueness of Section 63 of the Finance Act, counsel submitted that the Act does not provide a definition of who a next of kin is, what particulars of the next of kin should be obtained and what is to be done in relation to keeping such records or data. Further the section does not indicate or provide clarity on how corporate clients are to be handled and does not give distinction between individual persons and legal persons or even whether minors can be listed as next of kin. To buttress this argument, she relied on the case of **Katiba Institute & Anor –vs- Attorney General & Anor (2017) eKLR** (Justices Kanyi Kimondo, G. Odunga and C. Mwita) and the case of **Aids Law Project –vs- Attorney General & 3 Others (2015) eKLR** (Justices Isaac Lenaola (*as he then was*), Mumbi Ngugi and George Odunga) which dealt extensively with the issue of vagueness of legislations.

19. On whether there was public participation, counsel submitted that the public participation plays a central role in legislative functions of government and that courts have held that it is not mere public relations exercise and for that reason, the legislative process ought to be a true reflection of the public participation so that the end product is owned by the public as it then bears their seal of approval as was held in the case of **Okiya Omtatah Okoiti –vs- Cabinet Secretary, National Treasury & 3 Others (2018) eKLR**.

20. Accordingly, she submitted that what was introduced as clause 57 was not what was in the Bill at the time the Bill underwent public participation and it was mandatory for the 2<sup>nd</sup> Respondent to resubmit the Bill to the public to obtain their views. She therefore urged the court to allow the petition having clearly demonstrated that the petition is well merited.

#### **2<sup>nd</sup> Respondent's Submissions**

21. Mr. King'ori appearing for the 2<sup>nd</sup> Respondent highlighted his written submissions dated 24<sup>th</sup> April, 2019. While relying on the case of **Institute of Social Accountability & Anor –vs- National Assembly & 4 Others (2015) eKLR**, counsel submitted that the assertion that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. These principles were also enunciated by the Court of Appeal in the case of **Pevans East Africa Ltd & Anor –vs- Chairman, Betting Control and Licensing Board & Others (Civil Appeal No. 11 of 2018)**.

22. On whether Section 63 of the Finance Act, 2018 is an infringement to the right of privacy, as well as a contradiction to Section 31(2) and (3) of the Banking Act, counsel submitted that in order to determine the constitutionality of a statute, the court has to consider the purpose and effect of the impugned statute or section thereof. While relying on the Canadian Supreme Court case of **R –vs- Big M Drug Mart Ltd (1985) 1 SCR 295** and the case of **Mugambi Imanayara & Anor –vs- Attorney general & 5 Others (2017) eKLR**, counsel submitted that when constitutionality of a law is challenged on grounds that it infringes the constitution, what the court will consider is the direct and inevitable effect of such law.

23. Counsel further submitted that the phrase “next of kin” was defined in the case of **Mathias Kong'ani Rupia & Another –vs- Roselyne Wesonga Shiyuka & Anor (2008) eKLR** as (1) nearest blood relations according to the law consanguinity and (2) those entitled to take under statutory distributions of intestate estates. He further submitted that a next of kin is not necessarily a beneficiary under the Law of

Succession and at best, can ensure that necessary steps are taken towards obtaining letters of administration. Therefore, the impugned provision does not interfere with the succession laws as alleged by the Petitioner or at all.

24. It was his submission that where a statute does not define a word, the court will endeavor to apply the general rules of interpretation in defining such a word within the context used in the statute. To buttress this argument, counsel relied on the case of **Law Society of Kenya – vs- Kenya Revenue Authority & Anor (2017) eKLR** for the proposition that court must seek to find out the underlying intention of the legislature and in the same pursuit can within permissible limits strain the language so as to avoid such unintended mischief. Further that the decision to protect customers and their deposits is a policy which is best suited for the executive and parliament.

#### **Analysis and Determination**

25. I have very carefully considered the petition, the 2<sup>nd</sup> Respondent's Replying affidavit, the Advocates rival written submissions as well as oral submissions and authorities relied upon by the counsel, and from the above the issues arising for consideration can be summed up as follows:-

- a) **Whether the court has jurisdiction to hear and determine the petition herein?**
  - b) **Who is required to rebut the general presumption of constitutionality of legislation and what is the court required to look at to determine the constitutionality of a statute?**
  - c) **Whether section 63 of the Finance Act, 2018 as enacted is an infringement to the right of privacy as provided in the constitution as well as in contradiction to section 31(2) and (3) of the Banking Act?**
  - d) **Whether section 63 of Finance Act, 2018 is ambiguous, imprecise and vague?**
  - e) **Whether there was public participation in enacting section 63 of the Finance Act, 2018?**
  - f) **What orders should the court grant if any?**
- A) Whether the court has jurisdiction to hear and determine the petition herein?**

26. The petition before the court seek the interpretation of the constitution and determination whether section 63 of Finance Act 2018 and section 31(c) of the Banking Act are in conflict with Article 31(c) of the constitution amongst other prayers as regards interpretation of the constitution.

27. Under Article 3(2) of the constitution every person is obligated to respect, uphold and defend the constitution. Under Article 22(1) of the constitution every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated or infringed or is threatened. Similarly Article 258(1) of the constitution provides every person has the right to institute court proceedings, claiming the constitution has been contravened or is threatened with contravention. The petition before this court had been lodged by the petitioner in interest of its members pursuant to Articles 22(2) (d) and 258(2) of the constitution of Kenya 2010.

28. The petitioner herein is a corporate body duly registered under the Law of Kenya composed of 47 members all of which are commercial banks and microfinance banks. I find in light of Articles 22 and 258 of the constitution of Kenya 2010, the petitioner is within its rights to file the present petition and has the requisite locus standi to do so.

29. On the issue of hearing and determination of the matters raised in this petition, Article 23 of the constitution gives the court jurisdiction to hear and determine matters involving violation of fundamental rights under the Bill of Rights. The High Court further has jurisdiction, in accordance with Article 165 of the constitution to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of rights; in any proceedings brought under Article 22, where a court may grant appropriate relief, including:-

- a) **A declaration of rights;**
- b) **An Injunction;**
- c) **A conservatory order;**
- d) **A declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**
- e) **An order of compensation;**
- f) **An order of Judicial Review.**

30. Further **Article 165 (3) (d) of the Constitution of Kenya 2010** gives High Court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

31. In the instant petition, the petitioner seeks interpretation of Articles 24 and 31(c) of the Constitution of Kenya 2010 and section 31 (2) and (3) of the Banking Act by introduction of section 31A of the Banking Act. In view of the above I find that the petition herein is premised on the jurisdiction of the High Court to interpret the constitution. The dispute herein, being a question as to whether the impugned amendment is inconsistent with or in contravention of the constitution, the suit falls squarely within the purview of Article 165(3) (d) of the Constitution of Kenya 2010. I accordingly find and hold, in view of the above this court has jurisdiction to determine this dispute.

32. Whereas the legislative authority vests with the National Assembly, the 2<sup>nd</sup> Respondent, where a question arises as to the interpretation of the constitution and whether enactment of legislation is inconsistent with the constitution or is in contravention of the constitution, the High Court is constitutionally empowered to determine such an issue. The constitution is the supreme law of the Republic pursuant to Article 2(1) and (2) of the constitution and binds all persons. In **Simon Kitheka & 18 others vs County Government of Machakos and 2 others (2018) eKLR**, Hon. Justice Odunga while dealing with an issue of separation of power at paragraph 22 of his ruling held, that there is nothing like supremacy of the legislative assembly outside the constitution so that where a state organ fails to undertake its constitutional function in conformity with the constitution, the High Court, as the ultimate guardian of the constitution will point out that transgression.

33. It is my view, rightly and correctly for the judiciary to be firm and apply the constitution, whenever an issue arises as to the constitutionality of any act done or threatened by either executive or legislative it must act decisively. (See **Jane Mati & another vs Attorney General & another – Nairobi Petition No. 108 of 2011 at paragraph 31**).

34. I therefore find and hold that Judiciary is vested with the power to interpret the constitution, to safeguard, protect and promote its provisions as provided under Article 165(3) of the Constitution of Kenya 2010. It also has the duty and obligation to boldly intervene in actions of other arms of Government and state organs where it is alleged or shown that the constitution has either been violated or is threatened with violation. This is a sacred and lonely path that the Judiciary is called upon to always take and remain firm in discharging its mandate. To succeed one has not to look at the left or right in looking for justice for our nation but straight forward.

**B) Who is required to rebut the general presumption of constitutionality of legislation and what is the court required to look to determine the constitutionality of a statute?**

35. The courts in interpretation of the constitution, are guided by general principle that there is a rebuttable presumption that legislation is constitutional, therefore the onus of rebutting the presumption vests on those who allege the legislation's status (see **coalition for Reform and Democracy (CORD) & another vs Republic of Kenya & another (2015) eKLR and Macharia vs Murathe & another Nairobi HCEP 21 of 1998 (2008) 2 KLR (EP) 189 (HCK)**).

36. In determining the constitutionality of a statute or statutory provisions, the court must look at the object and purpose of the impugned statute or statutory provision. In **Katiba Institute & 3 others vs Attorney General & 2 others (2018) eKLR**.

37. I therefore find that when it comes to interpretation of the constitution Article 259(1) of the constitution, is the foundation of the interpretation of the constitution. It lays down the guidelines as follows:-

**"(1) This Constitution shall be interpreted in a manner that—**

- (a) Promotes its purposes, values and principles;**
- (b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**
- (c) Permits the development of the law; and**
- (d) Contributes to good governance."**

The values and principles of the constitution thus; the rule of law; human rights and fundamental freedoms, development of the law and good governance must permeate the process of constitutional interpretation. It must be holistic interpretation; so as to promote its purpose, values and principles and contribute to rule of law and good governance.

**C) Whether section 63 of the Finance Act, 2018 as enacted is an infringement to the right of privacy as provided in the constitution as well as in contradiction to section 31(2) and (3) of the Banking Act?**

38. In the instant petition, the petitioner seeks on interpretation of the constitution as to whether there is a conflict between the constitution read together with section 31(2) and (3) of the Banking Act and section 63 of the Finance Act 2018.

39. The constitution provides for limitation of rights and fundamental freedoms under Article 24 of the Constitution of Kenya 2010. It is clear under Article 24 of the Constitution of Kenya 2010, that a right of fundamental freedom shall not be limited except by law and then only to the extent the limitation is reasonable and justifiable. Article 31(c) deals with privacy and it is categorical that everyone has the right to privacy which includes the right not to have the privacy relating to their family or private affairs unnecessary required or revealed.

40. On the other hand **section 31(2) of the Banking Act (Cap 499) of the Laws of Kenya** provides that:-

**"(2) Except as provided in this Act, no person shall disclose or publish any information which comes into his possession as a result of the performance of his duties or responsibilities under this Act and, if he does so, he shall, for the purposes of section 49, be deemed to have contravened the provisions of this Act."**

41. Under section 37(3) of the Banking Act there are exceptional circumstances when the information may be disclosed by Central Bank.

42. Under section 63 of the Finance Act, 2018, it has amended the Banking Act by Adding section 31A that provides:-

**"(1) A bank or financial institution licensed under this Act shall, in respect of all accounts operated at the institution, maintain a register containing particulars of the next of kin of all customers operating such accounts, and shall update this register on an annual basis.**

**"(2) A bank or financial institution which contravenes subsection (1) commits an offence and shall be liable, for each account in which there is default, to a fine not exceeding one million shillings."**

43. From the above, it is clear, that section 31(c) now imposes upon the Banks or Financial institution to maintain a register containing particulars of the next of kin of all customers and any bank, that contravenes the said section is liable upon conviction for each count in default to a fine not exceeding one million shillings. It is petitioner's contention, that matters involving succession or inheritance of a deceased estate are handled in accordance with the Law of succession of Kenya. It is further submitted by the petitioner, that section 63 of the Finance Act, which has introduced section 31A of the Banking Act breaches the right of privacy as provided in Article 31(c) of the Constitution and section 31(c) of the Banking Act. It is further submitted by the petitioner, that its members are bound by the common law principles of confidentiality as well as the requirements under the Banking Act relating to non-disclosure of information.

44. The 2<sup>nd</sup> Respondent urge the impugned provision does not infringe the right to privacy as contended in the petitioner's petition. The 2<sup>nd</sup> Respondent urge in order to determine the constitutionality of a statute, the court has to consider the purpose and effect of the impugned statute or section thereof, and if either the purpose or the effect of its implementation infringes a right guaranteed by the constitution, the statute or section in question would be declared unconstitutional. In the case of the **R vs Big M Drug Mart Ltd. [1985] 1 S.C.R. 295**, the Canadian Supreme Court laid down the principle that;

**"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an Unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity".**

45. In the case of **Mugambi Imanyara and Another Vs Attorney General and 5 Others (2017) eKLR** the Court stated that when the Constitutionality of a law is challenged on grounds, that it infringes the Constitution, what the Court will consider is the *direct* and *inevitable* effect of such law.

46. It is 2<sup>nd</sup> Respondent's contention that the impugned section was expounded by Hon. Jude Njomo, a member of parliament for Kiambu constituency who stated his objective for amendment was:-

**"Many people are losing their money when they die. The banks do not bother to look for the next of kin and they remain with the money for exceedingly a long period of time."**

47. The 2<sup>nd</sup> Respondent contend such amendment is in compliance with section 19 of the Unclaimed Financial Assets Act No. 40 of 2011, which requires a holder of assets to which the Act applies which includes banks to make reasonable efforts to locate the owner and notify the owner about those assets. The purpose and effect of the impugned section therefore is to ensure that the abandoned property is released to its true owner, and within a reasonable time. It is further urged by the 2<sup>nd</sup> Respondent the effect of the impugned amendment is for Banks to maintain the details of the next of kin so that where a customer dies, his next of kin is aware of the existence of the said bank account thereby protecting the deceased's right to property under Article 40 of the Constitution. The 2<sup>nd</sup> Respondent therefore contends the purpose and effect therefore does not infringe the right to privacy of the petitioner.

48. On "next of kin" the 2<sup>nd</sup> Respondent submit the phrase "next of kin" was defined in the case of **Mathias Kong'ani Rupia & another vs Roselyne Wesonga Shiyuka & another (2008) eKLR** where the Court in relying on the definition in the Barron's Dictionary defined the "NEXT OF KIN" as;

**"The term is used generally with two meanings: (1) nearest blood relations according to the law of consanguinity, and (2) those entitled to take under statutory distributions of intestates estates. In the latter case, the term is not necessarily confined to relatives by blood, but may include a relationship existing by reason of marriage and may well embrace person who in the natural sense of the word, bear no relation of kinship at all."**

49. The 2<sup>nd</sup> Respondent therefore adopts the above definition, and urges definition of next **of kin** refers to the nearest relation; someone to be called in case of an emergency and may embrace persons who in the natural sense of the word bear no relation of kinship at all. The 2<sup>nd</sup> Respondent further submitted that a next of kin is not necessarily a beneficiary under the Law of Succession. At best, the next of kin can ensure that necessary steps are taken towards obtaining letters of administration. The impugned provision therefore does not interfere with the succession laws as alleged by the Petitioner or at all.

50. I have considered the petition, affidavit in support and the Replying affidavit as well as the rival submissions, so as to determine the constitutionality of the impugned section by considering its purpose and effect. I find the purpose or the effect of its implementation infringes a right guaranteed by the constitution. The requirement under section 63 of the Finance Act for banks and financial institution to maintain a register of next of kin is not justifiable nor does it have a rational connection with the intended purpose of the Finance Act, 2018,

whose purpose is to amend the law relating to various taxes and duties and for matters incidental thereto but not to ensure that the abandoned property is returned to its true owner and within a reasonable period as submitted by the 2<sup>nd</sup> Respondent. I further find, that section 63 of Finance Act, 2018 is derogation from the core normative content of the right to privacy. In view of the above-mentioned finding I have no doubt that the implementation of section 63 of the Finance Act infringes on a right guaranteed by the constitution. The section in question is therefore unconstitutional and contradicts Article 31(c) of the constitution and section 31(c) of the Banking Act to the extent that it breaches the right of privacy as provided in Article 31(c) of the Constitution and section 31(c) of the Banking Act.

#### **D) Whether section 63 of Finance Act, 2018 is ambiguous, imprecise and vague?**

51. The petitioner herein contend, that section 63 of the Finance Act, 2018 is vague, imprecise and incomprehensive as it requires banks and financial institutions to maintain a register containing particulars of the next of kin of all customers generating such accounts and update the register on annual basis. The petitioner's further contention is, that the Act does not provide a definition of who is the next of kin, and what particulars of the next of kin should be obtained and what is to be done in relation to such records/date.

52. The 2<sup>nd</sup> Respondent asserts the impugned section is clear, precise and unambiguous. The 2<sup>nd</sup> Respondent contends, that the phrase "**next of kin**" is a commonly used phrase and does not need to be defined every time it is used. The 2<sup>nd</sup> Respondent in support of this proposition relied on the case of **Jebra Kambole vs The Attorney General, Miscellaneous Civil Cause No. 32 of 2015**, where it was held that the words "**intentionally**" and "**unlawfully**" are commonly used and thus are phrases which need not be defined at all times.

The 2<sup>nd</sup> Respondent further submitted, that where a statute does not define a word used, the Court will endeavor to apply the general rules of interpretation in defining such word within the context used in the Statute.

53. **Section 63 of the Finance Act**, has not attempted to define who the next of kin is nor the particulars of the next of kin that should be obtained and what is to be done in relation to keeping such records or data. The section is mute nor does it provide clarity on how the corporate clients are to be handled nor does it give distinction between individual persons and legal persons. The section is equally silent on how minors can be treated nor doesn't indicate as to whether minors can be listed as next of kin. Taking the whole of the above, I find that section 63 of the Finance Act, 2018 and consequently section 31A of the Banking Act is not only ambiguous but vague.

54. Vagueness of a statute has been held in Kenya to amount to invalidity of a statute. In the **Katiba Institute & another vs Attorney General & another [2017] eKLR** which was heard and determined by a three-judge bench comprising Justice Kanyi Kimondo, G. Odunga and C. Mwitia, the Judges stated as follows at paragraph 71:-

**"71. Nevertheless, there is ambiguity and vagueness in some of the impugned provisions or their merits. The question that we must ask is: what is the effect of ambiguity and or vagueness in a statutory provision? Do they affect constitutionality of those provisions? In our view, ambiguity or vagueness in statutory provision makes that provision void. A provision will be said to be void where when the average citizen is unable to know what is regulated and the manner of that regulation; or, where the provision is capable of eliciting different interpretations and different results. Such a provision would not meet constitutional quality."**

55. Similarly in **Aids Law Project vs Attorney General & 3 others (2015) eKLR** a three Judge bench comprising of Justice Isaac Lenaola; Mumbi Nguni and George Odunga stated thus:-

**"For if the trumpet gives an uncertain sound, who shall prepare himself for the battle? So if the law gives an uncertain sound, who shall prepare to obey it? It ought therefore to warn before it strikes...Let there be no authority to shed blood; nor let sentence be pronounced in any court upon cases, except according to a known law and certain law... Nor should a man be deprived of his life, who did not first know that he was risking it."**

56. In **Grayned vs City of Rockford [1972] 408 US 104**, the United States Supreme Court identified:-

**"A basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vagueness offends several important rules...A vague law impermissibly delegates basic policy matters to policemen, Judges and Juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."**

57. On his part **Lord Diplock in Black-Clawson International Ltd vs Papierwerke Waldhof-Aschafenberg AG [1975] AC 591, 638** commented that:-

**"71. Therefore elementary justice or the need for legal certainty demands that rules by which the citizen is to be bound be ascertainable by him by reference to identifiable sources that are publicly accessible. It is therefore clear under the principle of legality, two principles emerge: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly ascertainably punishable when the act was done."**

58. Having found that section 63 of the Finance Act, 2018 is ambiguous and vague, I find that the enactment is void for vagueness as a citizen would not be able to know in advance what are the legal consequences that flow from the impugned section of the Finance Act, 2018. I find that the members of the petitioner are unable in, view of the ambiguity and vagueness of section 63 of the Finance Act, 2018, to know what is regulated and the manner of that regulation. I further find that section 63 of Finance Act, 2018 and consequently section 31A of the Banking Act lack certainty; it is confusing due to being imprecise and vague.

**E) Whether there was public participation in enacting section 63 of the Finance Act, 2018.**

59. Article 10 of the Constitution of Kenya provides that the national values and principles of governance bind all state officers, public officers and all persons whenever any of them enacts, applies or interprets any law. The national values and principles under Article 10(2) of the constitution include participation of the people, good governance, integrity, transparency and accountability.

60. Under **Article 95(2) of the constitution**, the 2<sup>nd</sup> Respondent is mandated to deliberate on and resolve issues of concern of the people. Under Article 118(1) (b) of the constitution it is clear that Parliament shall facilitate public participation and involvement in the legislative and other business of parliament and its committees.

61. In the instant petition, it is not disputed, that the Departmental Committee on Finance and Planning of the 2<sup>nd</sup> Respondent held public hearings from 1<sup>st</sup> to 3<sup>rd</sup> August, 2018 engaging stakeholders to obtain their views on the Finance Bill, 2018. The Chief Executive Officer of the Petitioner has confirmed in his replying affidavit, that he appeared before the committee and made submissions on behalf of the Petitioner more so pertaining to the provisions on the bank interest rates and the robin hood tax.

62. The Memorandum of Objects and Reasons of the Finance Bill, 2018 had provided that the bill formulates the proposals announced in the budget for 2018/2019 relating to liability and collection of taxes and matters incidental thereto and sought to amend various laws including the Banking Act. The Banking Act (Cap 488). The Bill seeks to amend the Banking Act to review the capping of interest rate to ensure access to credit facilities across the economy especially among the lower income retail consumers and small and medium enterprises. This is aimed at minimizing the adverse impact on credit growth, financial access and monetary policy effectiveness....

63. The Bill underwent public participation. The bill afterwards was debated upon by the members of the 2<sup>nd</sup> Respondent and new clauses were introduced. One of the clauses introduced in the bill as an amendment was insertion of clause 57A as follows;

**"57A. The Banking Act is amended by inserting the following new clause immediately after clause 31—**

**31A. A bank or financial institution licensed under this Act shall, in respect of all accounts operated at the institution, maintain a register containing particulars of the next of kin of all customers operating such accounts, and shall update this register every two years."**

64. The proposed amendment was further amended by inserting sub clause (2) –

**"A bank or a financial institution that contravenes sub-section (1) commits an offence and shall be liable for each account in which there is a default to a fine not exceeding Kshs 1 million in every year or part thereof during which the default persists."**

65. On 29<sup>th</sup> August, 2018, the National Assembly considered and passed Section 63 of the Finance Act. The Finance Bill, 2018 was subsequently forwarded to His Excellency the President of Kenya for assent in accordance with **Article 115** of the Constitution. The President however declined to assent to the Bill and referred it back to the 2<sup>nd</sup> Respondent after considerations on 13<sup>th</sup> September, 2018.

66. On 21<sup>st</sup> September, 2018, the President in exercise of his powers under **Article 115 (1) (b)** of the Constitution, assented to the Finance Bill. In the event, Section 63 of the Finance Act entered into force.

67. **Article 94** of vests legislative authority in Parliament and therefore the National Assembly House is allowed to amend a legislative proposal as Bill goes through the various stages of enactment of legislation. Such that the final statute passed by the National Assembly and which the President assented to is different from the Bill published at the first instance.

68. Once a Bill is published and read in the House, it goes through First Reading, Second Reading, Committee stage and Third Reading and the purpose of all these stages of the reading of a Bill is to allow the members of the House who represent different constituencies of the electorate to negotiate on their behalf and represent their varying interests.

69. The Constitution recognizes that a House of Parliament can amend Bills and hence **Article 124** allows Parliament to make Standing Orders to provide for its procedures for conducting House business.

*70. Pursuant to **Standing Order 133** of the National Assembly's Standing Orders, during the legislative process, amendments to the Bill can be moved during the Committee Stage.*

*71. The averment that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. However where major amendment is introduced and where is contrary to the purpose of the Bill the position may be different. This issue has been settled in the case of **Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR** where the Court that –*

***"We are aware that during the legislative process, amendments to the Bill may be moved during the Committee Stage and to hold that every amendment moved must undergo the process of public participation would negate and undermine the legislative process. In this case, we are satisfied that the amendment moved was in substance, within the parameters of what had been subjected to public participation during the review process. We find that the public was involved in the process of enactment of the CDF Act through the Task Force and review panel earlier set up by CDF Board. The***

***amendment was within the parameters of what was in the public domain and in the circumstances we find and hold that the amendment bill did not violate the principle of public participation."***

72. These principles were also enunciated by the Court of Appeal in *the case of Pevans East Africa Ltd and Another Vs. Chairman, Betting Control and Licensing Board and others (Civil Appeal No. 11 of 2018)* where the Court of Appeal held as follows

**"It must be appreciated that the National Assembly has heard the views of the Members of public and industry stakeholders on a Bill. It is not precluded from effecting amendments to the Bill before finally passing it. Those amendments do not necessarily have to agree with the views expressed by the people who have been heard so long as the views have been taken into account. In our view, it would bring the legislative process to a complete halt and undermine Parliament's ability to discharge its constitutional mandate if after having facilitated public participation on a Bill Parliament is required to adjourn its proceedings every time a Member proposes an amendment to the Bill so that further public participation can take place on the particular proposed amendment."**

73. Both Houses of Parliament can exercise their legislative will by enacting laws and amending existing laws as well as bills which are before the House.

74. There is nothing unconstitutional where the National Assembly chooses to amend a legislative proposal from the initial form; because as a bill goes through debate and public participation, the House may co-opt proposed amendments and drops some clauses as the House deems fit so long as the amendments are minor and do not alter the purpose of the Bill

75. It is therefore the 2<sup>nd</sup> Respondent's submission that to argue a House of Parliament must pass a legislative proposal in its initial form is to take away the power that Article 94 of the Constitution grants to both Houses of Parliament and the power Article 95 (3) of the Constitution grants to the National Assembly to exercise their legislative will as the House deems fit.

76. In **Civil Appeal 11 of 2018; Pevans East Africa Limited & Others vs Chairman, Betting Control & Licensing Board (supra)** the Court of Appeal held that National Assembly is not precluded from effecting amendments to a Bill after hearing views from the public and that Parliament is not required to adjourn its proceedings every time a member proposes an amendment to the Bill so that further public participation can take place on the Bill.

77. The National Assembly did conduct public participation on the Finance Act, 2018 and took the views of the public into account as well as the views of all members of the National Assembly as representatives of various constituencies before introduction of the new clause.

78. I have considered the facts and counsel rival submissions and there is no doubt that the new clause as introduced was contrary to the objection and reasons for seeking to amend the Banking Act; at a time of adoption of the proposed amendments, the petitioner, a key stakeholder was denied an opportunity to participate in the enactment of the impugned amendments in contravention of the provisions of Article 118 of the Constitution of Kenya 2010. There is uncontroverted evidence from the petitioner's affidavit in support of the petition that there was no public participation in the enactment of the impugned section. The alleged amendment was not a minor amendment but a major or substantive amendment which was against the purpose of the Bill and which required public participation. The passed legislation contain unreasonable provision which provisions are punitive as members of the petitioner are liable to pay Kshs.1,000,000 for each account in default.

79. The 2<sup>nd</sup> Respondent also submits that the Application and the Petition herein are also a threat to the doctrine of Separation of powers and is an encroachment to the legislative mandate of Parliament. An order by the Court granting the Petitioner's prayer would be a negation of the doctrine of separation of powers and this would be an interference of Parliament's constitutional powers, by the Judiciary. To the contrary I reiterate as earlier stated that the Judiciary is vested with power to interpret the constitution, safeguard, protect and promote the provisions of the constitution as provided under Article 165(3) of the constitution. It also has obligation and duty to intervene in actions of other arms of government and state organs where it is alleged or shown that the constitution has either been violated or threatened with violation. I therefore do not find basis nor agree that by granting orders as sought in this petition would be a negation of the doctrine of separation of powers and that would be an interference of Parliament's constitutional powers by Judiciary.

80. I note the petition before this court concerns the interpretation of the constitution as to whether the introduction of clause 57A which became section 63 of the Finance Act, 2018 required public participation. I have upon perusal of the relevant documents and affidavits as well as the annexure thereto, noted what was introduced as clause 57A was not what was in the bill at the time the bill underwent public participation and I find upon amendment of the bill, it introduced a substantive amendment affecting the rights of the petitioners, it was therefore mandatory for the 2<sup>nd</sup> Respondent to have resubmitted the Bill to the public to obtain their views. I note this was not a minor amendment such as adding a comma and full stop. In view of the above, I find and hold that there was no public participation in the major enactment of section 63 of the Finance Act, 2018 and that the National Assembly violated Article 10(2) and Article 118 of the constitution in introducing clause 57A during the committee of the whole house stage.

#### **F) What orders should the court grant if any?**

81. I find that court in performing its constitutional mandate, it is permitted to intrude into the domain of other branches of government and is vested with jurisdiction to invalidate laws, that are found to be unconstitutional in harmony of it's duty to be the custodian of the constitution. I have considered the petitioner's petition and find that the petitioner has demonstrated that the petition is merited.

82. Having come to the conclusion that I have, I find that the petition is meritorious and I proceed to make the following orders:-

**a) Upon interpretation of the constitution and determination whether section 63 of the Finance Act, 2018 and section 33(c) of the Banking Act are in conflict, with Article 31(c) of the constitution, I find and hold that section 63 of the Finance Act, 2018**

and section 31(c) of the Banking Act are in conflict with Article 31(c) of the constitution.

b) Upon interpretation and determination on whether, the 2<sup>nd</sup> Respondent by introducing major amendment, which was contrary to the purpose of the Bill during the 2<sup>nd</sup> and 3<sup>rd</sup> Reading of the Finance Bill, 2018, I find that the 2<sup>nd</sup> Respondent breached the national values and principles enshrined under Article 10 of the constitution for failing to subject the amendment to public participation.

c) A declaration be and is hereby issued to the effect that section 63 of the Finance Act, 2018 (Act No. 10 of 2018) and consequently section 31(c) of the Banking Act are null and void and of no legal effect for being unconstitutional.

d) A declaration be and is HEREBY issued to the effect that section 63 of the Finance Act, 2018 and consequently section 31(c) of the Banking Act is invalid for being vague and ambiguous.

e) The matter was brought in public interest I direct that each party to bear its own costs.

Dated, signed and delivered at Nairobi this 20<sup>th</sup> day of June, 2019.

.....

J .A. MAKAU

JUDGE